92-1627

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES R. HEFTI and
MARION HEFTI,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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PRELIMINARY MATTER

Questions Presented

I. Whether the Eighth Circuit Court of Appeals sanctioned a departure from the usual course of judicial proceedings by the Tax Court in allowing said Tax Court to uphold a tax regulation (§301.7609-5) which exceeded the scope of a statute (26 U.S.C. 7609(e)) under the circuit's own established case law, and allowing the regulation to supersede the case law.

II. Whether the Eighth Circuit Court of Appeals has rendered an opinion which is in conflict with its own prior decision and in conflict with the rulings of eight other circuits on the issue of compliance with a summons rendering an appeal "moot."

List of Parties

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United States of America, Respondent

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TABLE OF CONTENTS

	Page
Preliminary Matter	i
Questions Presented	i
List of Parties	ii
Table of Authorities	iv
Petition	1
Opinion Below	2
Jurisdiction to Review	3
Constitutional and Statutory Provisions	3
Statement of the Case	4
Existence of Jurisdiction Below	11
Reasons for Granting Writ	11
Conclusion	35
Certificate of Service	37

TABLE OF AUTHORITIES

Business Guides v. Chromatic Communications Ent., 111 S.Ct. 922, 931 (1991)

E.E.O.C. v. St. Regis Paper Company, 717 F.2d 1302 (1983)

Gluck v. United States, 771 F.2d 750 (1985)

Hefti v. C.I.R., 899 F.2d 709 (8th Cir. 1990)

Hintze v. Internal Revenue Service, 879 F.2d 121 (4th Cir. 1989)

Kurshan v. Riley, 484 F.2d 953 (1973)

Marbury v. Madison, 5 U.S. (1 Cranch), 137 L.Ed.2d 60 (1803)

O. Hommel and Company v. Farrow Corporation, 659 F.2d 340, 354 (3rd Cir. 1981)

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S . 120 (1989)

Rubin v. United States, 449 U.S. 424, 430 (1981)

United States v. Arthur Andersen & Co., 623 F.2d 720 (1980)

United States v. Deak-Perera International Banking Corporation, 610 F.2d 89 (1979)

United States v. Equity Farmers Elevator, 652 F.2d 752 (1981)

United States v. Orlowski, 808 F.2d 1283 (8th Cir. 1986)

United States v. Patmon, 630 F.2d 458 (1980)

United States v. Porter, 711 F.2d 1397 (1983)

United States v. Sherlock, 756 F.2d 1145 (1985)

United States v. Trails End Motel, Inc., 657 F.2d 1169 (1981)

Vesco v. Securities and Exchange Commission, 462 F.2d 1350 (1972)

Bender's Federal Tax Service, Vol. 10, ¶P-13.68

PETITION

Come now Petitioners and pray this Court that it issue a Writ of Certiorari to the United States District Court for the Eighth District to review an order of that Court dated January 8, 1993, and upon which rehearing was denied on February 25, 1993. The order of the Appellate Court affirmed a judgment of the Tax Court. The Tax Court ruled that Treas. Reg. §301.7609-5(b) was not inconsistent with 26 U.S.C. 7609(e) and that the case of United States v. Orlowski, 808 F.2d 1283 (8th Cir. 1986) was mere dicta.

Petitioners state that the rule in Orlowski that a case is deemed "pending" until there exists full compliance with the IRS summons or until the six day appeal period following the entry of the judicial enforcement order has lapsed, whichever is shorter, was the rule of law in the Eighth Circuit and was bound to be followed by the

IRS in its interpretation of this statute within the Eighth Circuit.

Petitioners state that the Appellate Court thus sanctioned a departure from the usual court of judicial proceedings contrary to its own established law, and that its opinion is contrary to the law of eight other circuits wherein it has been repeatedly said that compliance with a summons renders any appeal "moot."

WHEREFORE, Petitioners state that the orders herein and the affirmance of the Tax Court order were improper and call for correction by this Court under its powers of supervision. Petitioners request this Court to issue its Writ of Certiorari to the United States District Court for the Eighth District to hear this matter, in this Court.

OPINION BELOW

The opinion of the Eighth Circuit

Court of Appeals and the first appeal in this matter, the remand to the Tax Court, the decision of the Tax Court and the opinion and order of the Eighth Circuit Court of Appeals on the subsequent appeal from the Tax Court are all hereto appended.

JURISDICTION TO REVIEW

The Court below entered its opinion and order on 91-3396 on January 8, 1993. Thereafter a motion for rehearing was filed and the petition for rehearing was denied under date of February 25, 1993.

The jurisdiction of this Court is invoked under §1651(a) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article II, Section 3

The president . . . shall take care that the laws be faithfully executed.

26 U.S.C. 7609
Special Procedures for Third Party Summonses

(e) Suspension of statute of limitations --

(1)(b) Action. If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under §6501 (relating to the assessment and collection of tax) or under §6531 (relating to criminal prosecutions) with respect to such persons shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

Treas. Reg. §301.7609-5(b)

(b) Period during which a proceeding, etc., is pending. Under §7609(e) the statute of limitations may be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending. This period begins on the date the petition to quash the summons is filed in district court. The period continues until all appeals are disposed of, or until the expiration of the period in which an appeal may be taken or a request for a rehearing may be made. Full compliance, partial compliance, and noncompliance have no effect on the suspension provisions.

STATEMENT OF THE CASE

This case involves an original Tax

Court case which was appealed to the Eighth Circuit Court of Appeals. That Court remanded the matter to the Tax Court for a determination as to whether Treas. Reg. 301.7609-5(b) exceeded the congressional authorization in I.R.C. 7609(e) in light of the Orlowski decision. The Tax Court then ruled again against the Petitioners and the matter was reappealed to the Eighth Circuit Court. On the second appeal the Court affirmed the Tax Court order and it is from this appellate court order that we appeal. We have not included the original Tax Court opinion because of the length of the Addendum. The factual information, however, is well documented in all of the appended opinions and orders.

The Heftis received a statutory notice of deficiency from the Commissioner of Internal Revenue on December 7, 1987, for deficiencies in the tax years 1983, 1984,

and 1985. In March, 1988, the Heftis filed petitions in the Tax Court seeking a redetermination of the 1983 case. The Heftis argue that the determination of penalties were assessed in error and that the Commissioner had sent their statutory notice of deficiency beyond the three-year limitations period prescribed by statute, thus rendering the Tax Court without jurisdiction. Because the Heftis failed to appear when their cases were called for trial in October, 1988, the Tax Court ruled against them for the tax years 1983, 1984, and 1985, even though the years 1984 and 1985 were not before the Court. The primary point on appeal was that the statute of limitations had expired before the notice of deficiency was set and that the Tax Court was, therefore, without jurisdiction.

The Heftis received their statutory

notice of deficiency for the 1983 tax year on December 7, 1987, some three years and 236 days after their timely tax filing of April 15, 1984. The deficiency was assessed beyond the statute of limitations by about 236 days absent tolling of the statute. The statute was tolled by a petition from the Heftis to quash a summons obtained by the Commissioner in United States District Court against a third-party bank. The Heftis filed their motion to quash on October 29, 1986, and the statute was tolled at that point. On May 1, 1987, the district court dismissed the petition. On May 18, 1987, the bank rendered full compliance with the summons.

Two dates are in contention as to the day at which the statute began to run again; May 18, 1987, the date of full compliance by the third-party bank, and June 30, 1987, the date by which the Heftis

would have had to have filed an appeal from the District Court's May 1st order of dismissal. Taking May 18, 1987, as the date on which the statute began to again run, the tolled period was for some 201 days and the notice of deficiency sent on December 7, 1987, would have been outside the statute of limitations by more than a month. If the statute started running on June 30, 1987, the tolled period was for some 244 days and the deficiency notice would have been mailed inside the statutory period by approximately a week.

On appeal the Appellate Court held that the denial of the summary judgment merges into the order of dismissal and final decision of the Tax Court and that the question of the statute of limitations was reviewable. There had been no order on the motion by the Tax Court. The actions of the Heftis triggered the suspension of

the statute of limitations and under the statute (7609(e)) the same was suspended for the period during which a proceeding and appeals therein with respect to the enforcement of the summons was pending. The Appellate Court noted that United States v. Orlowski, 808 F.2d 1283 (8th Cir. 1986), had interpreted that statute and that it held that a proceeding to enforce an IRS summons should be deemed "pending" until there exists full compliance with the IRS summons or until the 60-day appeal period following the entry of the judicial enforcement order has lapsed, whichever is shorter. The Court indicated the regulation relied on by the IRS (Treas. Reg. 301.7609-5(b)) was directly contrary to the holding in Orlowski and that it was clear that in light of the holding in Orlowski with respect to 26 U.S.C. 7609(e) that the Treasury Regulation may exceed the

scope of that section and thereby be invalid. The Appellate Court, therefore, remanded the matter to the Tax Court to consider the scope of the treasury regulation, vis-a-vis, the statutory authorization and to make a determination whether the regulation was inconsistent with the statute under Orlowski.

The Tax Court issued its memorandum and order on July 31, 1991, holding that the regulation was consistent with the statute and was valid and, further, that Orlowski was mere dicta and should not be followed in this matter.

The matter was appealed for a second time to the Eighth Circuit Court of Appeals and on January 8, 1992, that the Appellate Court issued its opinion and order affirming the judgment of the Tax Court. It is from said order that this appeal is taken.

EXISTENCE OF JURISDICTION BELOW

The matter below was an appeal of a Tax Court case to the Eighth Circuit Court of Appeals and jurisdiction was had under 26 U.S.C. 7482 and the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. Whether the Eighth Circuit Court of Appeals sanctioned a departure from the usual course of judicial proceedings by the Tax Court in allowing said Tax Court to uphold a tax regulation (§301.7609-5) which exceeded the scope of a statute (26 U.S.C. 7609(e)) under the circuit's own established case law, and allowing the regulation to supersede the case law.

As background and the factual basis herein, we note that the Heftis received a statutory notice of deficiency from the Commissioner of Internal Revenue on

December 7, 1987, for deficiencies in the tax years 1983, 1984, and 1985. In March, 1988, the Heftis filed petitions in the Tax Court seeking a redetermination of only the 1983 case. The Heftis argued that the determination and penalties were assessed in error and that the Commissioner had sent their statutory notice of deficiency beyond the three-year limitations period : prescribed by the statute (Appendix 78). The Heftis' case was dismissed in October, 1988, when the parties failed to appear at a hearing (Appendix 80).

The Heftis received their statutory notice of deficiency for the 1983 tax year on December 7, 1987, some three years and 236 days after the timely filing of April 15, 1984. The deficiency was assessed beyond the statute of limitations by about 236 days, absent some tolling of the statute. The statuted was tolled by a

petition from the Heftis to quash a third-party summons obtained by the Commissioner in the U. S. District Court. The Heftis filed a motion to quash on October 29, 1986. The statute was tolled at that point. On May 1, 1987, the District Court dismissed the petition. On May 18, 1987, the bank concerned rendered full compliance with the third-party summons (Addendum 82).

Two dates then were in contention as to the day on which the statute began to again run: May 18, 1987, the date of full compliance by the third-party bank, and June 30, 1987, the date by which Heftis would have had to have filed an appeal from the District Court's May 1st order of dismissal. Taking May 18, 1987, the date of compliance, as the date on which the statute began to again run, the tolled period was for some 201 days, and the notice of deficiency sent on December 7,

1987, would have been outside the statute of limitations by more than a month. If the date of June 30, 1987, is taken as the beginning, the tolled period was for some 244 days and the deficiency notice would have been mailed inside the statutory period (Addendum 83).

The Heftis appeal from the Tax Court dismissal of their case was taken to the Eighth Circuit Court of Appeals as Hefti v. C.I.R., 899 F.2d 709 (8th Cir. 1990) (Addendum 77). This appeal concerned only the 1983 taxes. We note in passing that the Tax Court judge ruled against them for the years 1984 and 1985 even though there was no petition before the Court relative to those years. The basic principle of the Hefti appeal was their motion for summary judgment filed in Tax Court to the effect that the statute of limitations had expired and that the Court had no jurisdiction in

the matter. The basic contention of the Heftis was that the statute began to run on May 18, 1987, the date of full compliance by the third-party bank. This was based on U.S.C. §7609(e) (p. 4), which provides that the statute shall be suspended for the period during which a proceeding and appeals therein with respect to the enforcement of such summons is pending. This statute was interpreted by a prior Eighth Circuit Court decision in United States v. Orlowski, 808 F.2d 1283 (8th Cir. 1986), cert. denied, 482 U.S. 927, 107 S.Ct. 3210, 96 L.Ed.2d 697 (1987), which concluded as follows:

> We hold that a proceeding to enforce an IRS summons should be deemed "pending" until there exists full compliance with the IRS summons or until the 60-day enforcement order has lapsed, whichever is shorter (emphasis added). This rule follows directly from the statute. A taxpayer who intervenes in a third-party

> summons under §7609(b)(1) may appeal a judicial enforcement order. (footnote refs. omitted). Such an appeal is valid when filed at any time during the 60-day appeal period so long as the parties subject to the summons have not yet complied with the summons. (emphasis added)
>
> * * *
>
> This circuit as well as every other circuit that has considered the question has determined that compliance with an IRS summons moots a taxpayer's appeal of summons enforcement orders. Thus because the taxpayer has the capacity to appeal an outstanding summons enforcement order at any time during the 60-day appeal period, a proceeding to enforce an IRS summons is necessarily "pending" during this 60-day appeal period. Orlowski, supra, at 1287.

Therefore, the Heftis conclude the statute of limitations recommenced on May 18, 1987.

A plain reading of this clear rule (as called by the Court) indicates that the statute of limitations restarts when the compliance occurs within the 60-day period. As the Court says the rule results directly

from the statute and the parties may take an appeal so long as there has been no compliance with the summons. The basic principle involved is that principle of law embraced by all of the circuits to the effect that compliance with an IRS summons moots an appeal. There is nothing further for a court to decide and nothing further that a court can do. If there is an outstanding summons, it may be appealed within the 60-day period. If it has been complied with, it is no longer outstanding and the ability to appeal is lost. The only thing left is a procedural rule that may allow you to file a frivolous appeal and subject yourself to immediate dismissal of same as well as fines for filing such a frivolous appeal. There is no substance or subject matter for a court to deal with. This is a basic jurisdictional matter and as we will see further, all circuits have

until recently agreed upon this point.

To counter this argument, the Government relied on Treas. Reg. §301.7609-5(b), the pertinent part of which under §5(b) states that, "The (suspension) period continues until all appeals are disposed of or until the expiration of the period in which an appeal may be taken or a request for a rehearing may be made. Full compliance, partial compliance, and non-compliance have no effect on the suspension provision." As the Appellate Court noted, this regulation is directly contrary to the holding in Orlowski and that what is clear in light of the Court's holding in Orlowski with respect to the statute is that the treasury regulation may exceed the scope of the statute and thereby be invalid (Addendum 97). What it should have said was that because of the holding in Orlowski, the treasury regulation exceeded

the scope of the statute and was invalid, at least so far as this circuit was concerned.

The Court chose not to render the judgment clearly called for but instead remanded the matter to the Tax Court vacating the judgment and directing the Tax Court to consider the scope of the treasury regulation vis-a-vis statutory authorization from 26 U.S.C. 7609(e) consistent with the Court's opinion. The Court went on to say that "if the Tax Court deems the treasury regulation valid and controlling in this case it may enter a judgment of dismissal consistent with that ruling and the previous determination of the Tax Court. Alternatively, if the Tax Court determines the regulation is inconsistent with the statute, see Orlowski, 808 F.2d at 1287, it must enter an order granting the taxpayers summary

judgment on the grounds that the deficiency notice for 1983 was sent by the Commissioner out of time" (Addendum 99) (emphasis added).

We think that the Court's decision was correct, of course, however, the direction to the Tax Court is not really clear. We think that what the Appellate Court should have done was to state the Tax Court should determine if the regulation is consistent using the law of the circuit under Orlowski as its guide and let the Tax Court determine what the law of the circuit was and apply the same to the case. The alternate submission left the door open for the Tax Court to do just what it did.

The Tax Court simply went on to declare Orlowski as dictum for the stated reason that compliance was after the 60-day period in the Orlowski case (Addendum 41). It then went on to state that this was an

interpretive regulation; that it was a regulation originally proposed on August 21, 1980, and subsequently approved in its final form on May 31, 1983; that the regulation had been unchanged in the relevant part and that the word "pending" meant from inception until rendition of final judgment, largely ignoring the argument of mootness and whether compliance left anything for the courts to decide. It went on to conclude that the regulation was valid. It did not state that the language exceeded the language of §7609(e) but that it harmonized with the plain language of that section. It, therefore, found that in this case the bank's compliance had no effect on the suspension of the limitation and once again found against the Heftis (Addendum 75).

The matter was appealed again and is, of course, the specific subject of this

appeal. In arriving at its decision on the second appeal, the Court stated, "In any event, given our specific directions to the Tax Court on remand to determine the validity of the regulation, the issue is not whether the regulation is inconsistent with Orlowski, but whether the regulation is inconsistent with the statute" (Addendum 12). We ask the Court to please check this against the actual order given in the first case which stated that Orlowski was to be considered (Addendum 99). The Court then in the second case simply ignored Orlowski and went on to state that the Tax Court decision is a reasonable interpretation of the statutory term "pending" and not inconsistent with the statute. It went on to affirm the Tax Court decision (Addendum 20).

The effect of the ruling in the second appeal simply rubberstamps a decision in a

lower court which runs totally contrary to the case law of the circuit. The opinion sanctions a departure from the normal course of judicial proceedings by allowing the Tax Court to tell it what the law in the Eighth Circuit is.

The net effect of the ruling is to overrule Orlowski, yet that is never said. It also raises a question as to whether the opinion in Orlowski relative to "mootness" any longer exists within the Eighth Circuit. It would appear that because a 60-day procedural rule is involved that the issue of compliance can no longer be declared to hold an action moot. The question of mootness, of course, as indicated before, goes to the basic question of jurisdiction. According to this decision compliance does not render a question moot for the reason that an Appellate Court has jurisdiction to dismiss

an appeal as moot. We do not agree. When an Appellate Court says the matter is moot, it admits that it had no jurisdiction in the first place. We think the decision was wrong and that it causes not only problems within the circuit but is contrary to law in other circuits. The matter is already being considered as a de facto overturning of Orlowski by tax manuals. See, Bender's Federal Tax Service, Vol. 10, §P-13.68.

We note that both the Tax Court and the second Appellate Court emphasized the word "pending," but that the statute reads "(the statute) shall be suspended for the period during which a proceeding, and appeals therein with respect to the enforcement of such summons is pending (emphasis added) (p. 4). It is not a question of a generalized pending of litigation but a question of enforcement.

If enforcement has been made, there is no pending possible appeal except on a hypothetical procedural basis. The wordage of Orlowski is very clear and is set out by the Court as a rule. It does not just mention the phrase "whichever is shorter," but refers to the matter a second time indicating "so long as the parties subject to the summonses have not yet complied with the summons." It notes that a taxpayer has the capacity to appeal an outstanding summons enforcement order. If the matter is complied with, there is no outstanding summons.

In Rubin v. United States, 449 U.S. 424, 430 (1981), this Court states that when the terms of a statute are unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances. This Court should not reject the natural reading of a rule or

statute in favor of a less plausible reading, even one that seems to achieve a better result. Business Guides v. Chromatic Communications Ent., 111 S.Ct. 922, 931 (1991); see also, Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S . 120 (1989). A plain simple reading of the statute would seem to be sufficient herein and not require interpretation as indicated by the Tax Court. Secondly, the rule of stare decisis and the need for an Appellate Court to abide by its own decision hardly needs case citation. The question of whether compliance with a summons moots an appeal and challenges its enforceability is hardly esoteric. Rather it is one that has risen repeatedly in the past and will undoubtedly arise in the future. The District Courts and the Eighth Circuit should not be required to choose between purportedly conflicting decisions

reached by various panels of that Court. The earlier case must control. O. Hommel and Company v. Farrow Corporation, 659 F.2d 340, 354 (3rd Cir. 1981).

When you have a clear statute and a clear decision under that statute, then the executive is bound by such statute and law. There can be no doubt that the Commissioner of Internal Revenue Service, as a member of the executive, is required to apply federal law as interpreted by the Federal Court. Marbury v. Madison, 5 U.S. (1 Cranch), 137 L.Ed.2d 60 (1803). The executive under the facts of this case and the law of the district had no choice but to find that the words of the regulation "full compliance, partial compliance and non-compliance have no effect on the suspension provision" clearly exceeded the law of the district and the scope of the statute and that the same, insofar as application within the

Eighth Circuit, was null and void.

II. Whether the Eighth Circuit Court of Appeals has rendered an opinion which is in conflict with its own prior decision and in conflict with the rulings of eight other circuits on the issue of compliance with a summons rendering an appeal "moot."

The Orlowski Court in 1986 noted that "every other circuit that has considered the question has determined that compliance with an IRS summons moots a taxpayer's appeal of summons enforcement orders" (808 F.2d at 1287). As noted before, it indicated that an appeal is valid so long as the parties subject to the summonses have not yet complied. The whole question of mootness was gone into by every court in every circuit with the general premise that once compliance is made there is nothing

further the Court can do or should do and that, therefore, there is nothing before the Court. Consequently, the issue is determined to be moot.

In United States v. Arthur Andersen & Co., 623 F.2d 720 (1980), the First Circuit dealt with the question of mootness and a possible exception thereunder, the "capable of repetition yet evading review" doctrine. The Second Circuit in United States v. Deak-Perera International Banking Corporation, 610 F.2d 89 (1979), affirmed the doctrine saying that there was no live controversy between the parties. The Third Circuit in Vesco v. Securities and Exchange Commission, 462 F.2d 1350 (1972), dealing with a securities subpoena, stated that the matter went directly to the jurisdiction of the Court and when a controversy concerning the subpoena no longer existed, the matter was moot. In Kurshan v. Riley, 484 F.2d

953 (1973), the Fourth Circuit upheld the same doctrine indicating that where testimony of a party had already been given, the question of the validity of the subpoena was moot. In United States v. Sherlock, 756 F.2d 1145 (1985), the Fifth Circuit stated that a taxpayer's submission of material in compliance with an IRS summons rendered moot his claim on appeal despite a claim of Fifth Amendment constitutional rights. In the Sixth Circuit, United States v. Patmon, 630 F.2d 458 (1980), the Court adopted the same position indicating that if no live controversy exists, an appeal should be dismissed as moot. In United States v. Porter, 711 F.2d 1397 (1983), the Seventh Circuit affirmed the doctrine of mootness despite a claim of a Fifth Amendment right. In the Eighth Circuit, we have Orlowski, supra, as well as United States v. Equity

Farmers Elevator, 652 F.2d 752 (1981). In E.E.O.C. v. St. Regis Paper Company, 717 F.2d 1302 (1983), the Ninth Circuit once more stated the premise that when no controversy exists the question regarding the enforceability of subpoenas is moot. In the Tenth Circuit, United States v. Trails End Motel, Inc., 657 F.2d 1169 (1981), the Court indicated that whatever case or controversy existed was extinguished by compliance with the summons.

As pointed out before, it would appear by the Court's decision in this matter that the question of mootness is no longer of import in the Eighth Circuit, disrupting the harmony in the prior decisions. There is further erosion on this doctrine in the Third Circuit. In the case of Gluck v. United States, 771 F.2d 750 (1985), the Appellate Court of that district indicated

the fact that after the District Court had refused to quash an IRS summons or to stay execution of judgment pending appeal, the bank concerned fully complied with the summons, which had resulted from Grand Jury information regarding taxpayer's bank accounts, did not render moot taxpayer's appeal from the District Court's refusal to quash summonses since the Court of Appeals could still fashion a remedy, namely, prohibition of the Government's use of information obtained from summoned documents if the Court of Appeals found that summons was illegal. That decision is in direct contradiction to its own prior decision in Vesco v. Securities and Exchange Commission, 462 F.2d 1350 (3rd Cir. 1972). In that case, just as in the pending case, the Court ignores prior case law even though the IRS in this particular case took the position that

Vesco was controlling. In other words, that compliance does render an appeal moot. This is a total inconsistency and is indicative of the way the IRS utilizes regulations and case law to suit its particular purpose in any given case. We would suggest that this Court read the dissent by Circuit Judge Garth in this matter (at p. 758). He suggested that Vesco should have been overruled or should have been complied with as being the prior case law of the district; that the result questions the doctrine of compliance with an IRS summons as being moot; and that this can only lead to more disharmony and inconsistency.

In other districts such as the ninth, we have cases subsequent to the Orlowski case and the 1983 establishment of the regulation and find that the Court still upholds the doctrine. In the Ninth Circuit

in the case of United States v. Kersting (2 cases), 891 F.2d 1407 (9th Cir. 1989), the Court again affirmed the doctrine of mootness. There was a question as to substantial compliance and the matter was sent back to the lower Court for that determination. In the case of Hintze v. Internal Revenue Service, 879 F.2d 121 (4th Cir. 1989), we find the Court upholding the doctrine of mootness and once again ironically find the IRS, despite the fact that it is 1989 and that the regulation has been long in effect, suddenly espousing the cause of mootness. In other words, when it suits their purpose they are more than willing to apply the doctrine, however, when it runs contrary to their wishes as in this case, the doctrine has no legal effect.

We feel that the conflict of the Third and Eighth Circuits compared to the other

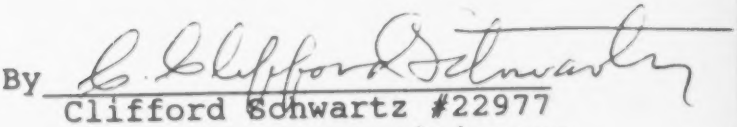
circuits in this matter presents a confusing and potentially dangerous problem. It is certainly of interest to millions of taxpayers, specifically those having audit matters before the IRS. This is an issue the Court should consider and should disallow the premise made by the Appellate Court in this decision to the effect that a procedural right to dismiss an appeal means that there is an "issue" before the Court; that something of substance is pending before the Court; and that, therefore, compliance does not render the matter moot.

CONCLUSION

We conclude, therefore, that the case presented to this Court is of compelling interest and demands the attention of this Court for the sanctioning of a departure from the usual course of judicial proceedings by the Tax Court as well as for

the importance of the question of mootness and the conflict of opinions between the various districts shown to exist. The Court should issue its writ of certiorari in this matter to bring this matter to this Court for review, briefing, and decision thereon.

SCHWARTZ & OCHS

By 

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CERTIFICATE OF SERVICE

Clifford Schwartz, of lawful age, being first duly sworn upon his oath, states that he mailed three conformed copies of Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, together with Addendum thereto, to Shirley D. Peterson, Assistant Attorney General, Gary R. Allen, Ann B. Durney, and Janet A. Bradley, Attorneys, Tax Division, Department of Justice, P. O. Box 502, Washington, D. C. 20044, on the 30th day of April, 1993, by placing same in the U. S. Mail, postage prepaid, St. Louis, Missouri.

S. Clifford Schwartz

Clifford Schwartz

Subscribed and sworn to before me this _____ day of April, 1993.

_____

Notary Public

My Commission Expires:

_____

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES R. HEFTI and
MARION HEFTI,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
UNITED STATES OF AMERICA,

Respondent.

ADDENDUM

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INDEX TO ADDENDUM

	Page
Order Denying Rehearing	1
Order of Judge McMillian	2
Order of Dismissal and Decision	21
Opinion of Judge Shields	23
Opinion of Judge Fagg	77

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3396

Charles Hefti; Marion Hefti,	*	
	*	
Appellants,	*	
	*	Order Denying
v.	*	Petition for
	*	Rehearing and
Commissioner of Internal Revenue of the United States of America,	*	Suggestion
	*	for Rehearing
	*	En Banc
	*	
Appellee.	*	

The suggestion for hearing en banc is denied. The petition for rehearing is also denied.

February 25, 1993

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3396

Charles Hefti; Marion Hefti;	*	
Appellants,	*	
v.	*	Appeal from the United States Tax Court
Commissioner of Internal Revenue of the United States of America,	*	
Appellee.	*	

Submitted: April 15, 1992

Filed: January 8, 1993

Before McMILLIAN and BOWMAN, Circuit Judges, and EISELE,* Senior District Judge (*The Honorable G. Thomas Eisele, Senior United States District Judge for the Eastern District of Arkansas, Sitting by designation.

McMILLIAN, Circuit Judge

This appeal follows a remand to the Tax Court[1] pursuant to Hefti v. Commissioner, 899 F.2d 709 (8th Cir. 1990), for a determination whether Treas. Reg. §301.7609-5(b) exceeded the statute, 26 U.S.C. §7609(e). The tax court, in a thorough supplemental opinion, first distinguished prior circuit cases and then upheld the regulation as a reasonable interpretation of the statute. 97 T.C. No. 11 (filed July 31, 1991) (Docket No. 4447-88) (hereinafter supp. op.). For reversal, the taxpayers argue the tax court's decision is inconsistent with and cannot be distinguished from circuit case law. For the reasons discussed below, we affirm the decision of the tax court.

The underlying facts are not disputed. On April 15, 1984, the taxpayers, Charles

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[1]The Honorable Perry Shields, United States Tax Court Judge.

and Marion Hefti, filed a joint federal income tax return for 1983. We note that the taxpayers are familiar with proceedings in tax court and have been involved in tax litigation on other occasions. On October 10, 1986, the Internal Revenue Service (IRS) served a third-party summons on the taxpayers' bank for books, papers and other records in connection with the taxpayers' return for 1983. On October 29, 1986, the taxpayers filed a motion to quash the summons in the federal district court for the Eastern District of Missouri. On May 1, 1987, the bank advised the IRS that it would comply with the summons on or after May 18, 1987. The tax court found that the IRS obtained the records from the bank on or before May 22, 1987. (This court's prior opinion noted that the date of full compliance was May 18, 1987. 899 F.2d at 710.)

On December 7, 1987, the IRS mailed the taxpayers a statutory notice of deficiency for tax years 1983, 1984,and 1985. The taxpayers filed a timely petition in the tax court for redetermination of the deficiency with respect to 1983 only. The taxpayers then filed a motion for summary judgment on the ground that the notice of deficiency had not been mailed as required by statute within 3 years after the filing of their return for 1983. The IRS argued the notice of deficiency had been timely mailed before the statutory period had been tolled by the pending summons proceeding. The IRS argued that the running of the statutory period did not resume until 60 days after the district court order dismissing the motion to quash (that is, until the 60-day period for filing an appeal had expired) and cited in support Treas. Reg. §301.7609-5(b). The

tax court denied the motion for summary judgment without discussing the statute of limitations issue or the regulation. After some delay, mostly due to discovery problems, the tax court granted the IRS's motion to dismiss the case for failure to prosecute. The taxpayers then appealed.

We agreed that the taxpayers had failed to properly prosecute their case, 899 F.2d at 710 (no justifiable excuse for failing to appear when case was called), but we remanded the case to the tax court for further consideration of the taxpayers' statute of limitations argument. Id. at 712-14. As noted above, the taxpayers filed the motion to quash the summons on October 19, 1986, thus tolling the running of the three-year statute of limitations for sending a notice of deficiency. 26 U.S.C. §6501(a). The district court dismissed the motion to quash on May 1,

1987, and the taxpayers had 60 days to file an appeal. The taxpayers argued that, because the bank had complied with the summons on May 18, 1987, which mooted any appeal from the order dismissing the motion to quash, the summons proceeding was no longer pending, and the statutory period resumed running, as of that date, citing United States v. Orlowski, 808 F.2d 1283, 1287 (8th Cir. 1986) (Orlowski), cert. denied, 482 U.S. 927 (1987), and United States v. Meyer, 808 F.2d 1304, 1306 (8th Cir. 1987) (Meyer). The IRS argued that the statutory period did not resume running until June 30, 1987, when the 60-day period for filing an appeal expired, citing Treas. Reg. §301.7609-5(b).

How long the statute of limitations was tolled was critical because if the statute of limitations was tolled only until the bank's compliance with the

summons (that is, from October 29, 1986, to May 18 or 22, 1987, at most 205 days), as argued by the taxpayers, and not until the expiration of the 60-day period for filing an appeal (from October 29, 1986, to June 30, 1987, or 244 days), as argued by the IRS, the notice of deficiency was untimely mailed on December 7, 1987, some 236 days after the expiration of the three-year period. We noted that the statute and the case law interpreting the statute were ambiguous. 899 F.2d 713. Although the regulation cited by the IRS, Treas. Reg. §301.7609-5(b), was directly contrary to the holding in Orlowski, 808 F.2d at 1287, and Meyer, 808 F.2d at 1306, neither case discussed the regulation. 899 F.2d at 713 & n. 8. Because it did not appear that the tax court had considered whether Treas. Reg. §301.7609-5(b) exceeded the scope of the statute, 26 U.S.C. §7609(e), and was

thus invalid, when it disposed of the taxpayers' motion for summary judgment, we remanded the case to the tax court for further consideration. 899 F.2d at 714.

On remand the tax court first characterized as dictum the "holding" in Orlowski that compliance with the summons suspends the tolling of the statutory period because in that case compliance did not occur during the appeal period. Supp. op. at 11. The tax court next found that the present case was factually distinguishable from both Orlowski and Meyer because in each of those cases, unlike the present case, compliance occurred after the expiration of the 60-day period for appeal and thus did not require consideration of the effect of Treas. Reg. §301.7609-5(b). Supp. op. at 12. The tax court agreed with this court that the statute, 26 U.S.C. §7609(e), was ambiguous

and did not define either the term "proceeding" or the term "pending." Supp. op. at 15. The tax court decided that the regulation was a reasonable interpretation of the statute and thus did not exceed the scope of the statute. Id. at 16-29. The tax court specifically noted that the regulation enjoyed particular force because it was a substantially contemporaneous construction of the statute, Id. at 17, that was consistent with the usual meaning of the term "pending" in federal procedure, Id., had remained unchanged since it was first proposed in 1980 even though the statute had been amended several times since then, Id. at 18-19, and had been consistently interpreted by the IRS. Id. at 19. In addition, the tax court noted that the regulation created a "bright line" which avoided confusion, and possible litigation, about whether and when there

had been compliance with the summons so that the statute of limitations would begin to run again. Id. at 24. This appeal followed.

For reversal, the taxpayers argue the decision of the tax court upholding the regulation is inconsistent with Orlowski. On its face the taxpayers' argument is correct because Orlowski held that "a proceeding to enforce an IRS summons should be deemed 'pending' until there exists full compliance with the IRS summons or until the sixty-day appeal period following entry of the judicial enforcement order has lapsed, whichever is shorter." 808 F.2d at 1287. However, because the facts in Orlowski did not involve full compliance within the appeal period, the analysis did not require application of the full compliance aspect of the holding. Moreover, Orlowski did not discuss the

regulation at all, probably because the summons enforcement proceeding in that case occurred in 1981 and the regulation, although first proposed in 1980, was not approved and filed until 1983. The regulation was cited, without discussion, in Meyer to support its holding that the statute of limitations is tolled during the sixty-day appeal period. 808 F.2d at 1306. However, as noted in the first appeal, the facts in Meyer, like Orlowski, did not involve full compliance within the appeal period, and Meyer "simply does not reach the question answered in Orlowski -- whether full compliance cuts off the tolled period." 899 F.2d at 713 n. 8. In any event, given our specific directions to the tax court on remand to determine the validity of the regulation, the issue was not whether the regulation is inconsistent with Orlowski, but whether the regulation

is inconsistent with the statute.

Title 26 U.S.C. §7609(e) provides in part that:

> [i]f any person takes any action [to quash the summons] . . ., then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) . . . shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

Treas. Reg. §301.7609-5(b) (as amended in 1986) provides in part that "[t]he period [during which a proceeding is pending] continues until all appeals are disposed of, or until the expiration of the period in which an appeal may be taken or a request for a rehearing may be made. Full compliance, partial compliance, and non-compliance have no effect on the suspension provisions."

We think the tax court's analysis is correct. The statute does not directly

address the precise question of whether full compliance within the appeal period suspends the tolling of the statute of limitations. As was noted in the first appeal, because the statute is ambiguous on this precise question, 899 F.2d at 712, the IRS provided the answer in the form of an interpretive regulation. We will uphold the regulation if it is found "to implement the congressional mandate in some reasonable manner." National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 476 (1979), citing United States v. Correll, 389 U.S. 299, 307 (1967); see Chevron U.S.A. Inc. v. National Resources Defense Council, 467 U.S. 837, 843-45 (1984) (interpretive regulations upheld if reasonable). "We do this because 'Congress has delegated to the [Secretary of the Treasury and his delegate, the] Commissioner [of Internal Revenue], not to

the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code." National Muffler Dealers Ass'n v. United States, 440 U.S. at 477, citing United States v. Correll, 389 U.S. at 307 (citing 26 U.S.C. §7805(a)); see Pagel, Inc. v. Commissioner, 905 F.2d 1190, 1992 (8th Cir. 1990).

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. . . . Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistence of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

National Muffler Dealers Ass'n v. United

States, 400 U.S. at 477.

We agree with the tax court that the regulation is a reasonable interpretation of the statutory term "pending" and not inconsistent with the statute. The regulation is entitled to considerable deference. Section 7609(e) was enacted as part of the Tax Reform Act of 1976 to provide procedural protection to persons who receive summons and persons whose tax liability is in question. The regulation was initially proposed in 1980 and was approved and filed in 1983 and is thus a substantially contemporaneous construction of the statute by the Commissioner. The IRS has consistently applied the regulation. See, e.g., Henson v. Commissioner, 51 T.C.M. (CCH) 1476, 1483 (1986), aff'd in part and rev'd in part on other grounds, 835 F.2d 850 (11th Cir. 1988); Edwards v. Commissioner, 42 T.C.M.

(CCH) 1706, 1708 (1981). Although Congress amended the summons provisions in 1982 to shift the burden of commencing summons litigation from the IRS to the taxpayer, Congress did not amend §7609(e). In 1986 the regulation was revised slightly to reflect this shift in litigation responsibly by changing the date tolling begins from "the date the action to enforce the summons is commenced" to "the date the petition to quash the summons is filed." In 1986 Congress amended §7609(e) to add an additional subsection but did not enact any provisions to change the regulation. Congress's failure to act to change the regulation is an indication that Congress did not perceive the regulation is an indication that Congress did not perceive the regulation to be unreasonable or inconsistent with Congressional intent. See Pagel, Inc. v. Commissioner, 905 F.2d

at 1192.

The regulation also furthers the administrative policy of promoting certainty and uniformity in the application of the statute of limitations. The definition of "pending" to include the 60-day period for filing an appeal, whether or not an appeal is filed, makes the date the statute of limitations begins to run easy to ascertain. In addition, by making compliance irrelevant to the statute of limitations, the regulation forecloses possible confusion and litigation about whether and when full compliance with the summons has occurred. For example, in the present case, there was some uncertainty about whether full compliance occurred on May 18 or May 22.

We also reject the taxpayers' argument that the regulation is inconsistent with federal procedure. The taxpayers argue

that full compliance suspends the tolling of the statute of limitations because compliance with a summons moots a taxpayer's appeal from the summons enforcement order. Orlowski, 808 F.2d at 1287 n. 6 (listing cases). This argument confuses pendency with mootness. Even if the records custodian complies with the summons within the 60-day period for filing an appeal, thereby making an appeal of the enforcement order moot, the taxpayer may nonetheless file a notice of appeal within the 60-day period. Once docketed, the appeal is pending, even though it is ultimately determined to be moot, and the court of appeals has jurisdiction to dismiss the appeal as moot. Cf. American Equitable Assurance Co. v. Helvering, 68 F.2d 46, 47 (2d Cir. 1933) (rejecting taxpayer's argument that lack of jurisdiction meant no proceeding was

pending for purposes of tolling the statute of limitations).

Accordingly, we affirm the decision of the tax court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES TAX COURT
Washington, D.C. 20217

CHARLES HEFTI, and MARION HEFTI,	)	
Petitioners,	)	
v.	)	Docket No. 4447-88
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

ORDER OF DISMISSAL AND DECISION

Pursuant to the remand of the Eighth Circuit Court of Appeals, the record in this case, and the Court's Opinion at 97 T.C. No. 11 filed July 31, 1991, it is

ORDERED that respondent's Motion to Impose Sanctions filed October 11, 988. is granted in that this case is dismissed for failure to properly prosecute. It is further

ORDERED and DECIDED that there is a deficiency in income tax and additions to tax due from the petitioners for the

taxable year 1983 as follows:

	Additions to Tax		
Deficiency	6653(a)(1)	6653(a)(2)	6661
$33,863.00	$1,693.00	50% of the interest due on $33,863.00	$8,466.00

/s/ Perry Shields
Judge

Entered: August 30, 1991

97 T.C. No. 11

UNITED STATES TAX COURT

CHARLES AND MARION HEFTI, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4447-88 Filed July 31, 1991

Respondent served a third-party administrative summons on petitioners' bank. Pursuant to sec. 7609(b)(2) petitioners filed in the district court a petition to quash the summons. The district court dismissed the petition and petitioners did not appeal but prior to the expiration of the appeal period the bank fully complied with the summons. The bank's compliance with the summons occurred 205 days after the filing of the petition to quash the summons. The period for appeal of the district court's dismissal of the petition expired 244 days after the filing of the petition. Respondent's deficiency notice was mailed to petitioners

3 years and 236 days after petitioners filed their 1983 income tax return. Held, sec. 301.7609-5(b), Proced. & Admin. Regs., comports with the plain language of section 7609(e) its origin and purpose and thereafter is a valid regulation. Held, further, the 3-year assessment period provided by sec. 6501(a) was suspended from the filing of the petition to quash until the expiration of the period for an appeal from the denial of such petition. Held, further, the deficiency notice of respondent was timely mailed.

Charles M. Shaw, for the petitioners.

Anthony S.Gasaway and Donald L. Wells, for the respondent.

SUPPLEMENTAL OPINION

SHIELDS, Judge: This case was remanded by the Court of Appeals for the Eighth Circuit for consideration by us of section 301.7609-5(b), Proced. & Admin.

Regs., vis-a-vis the suspension under section 7609(e)[1] of the period of limitations provided by section 6501(a).

On April 15, 1984, petitioners filed with the Internal Revenue Service (IRS) a joint Federal income tax return for 1983. On October 10, 1986, respondent served a third-party summons on the Landmark Bank of St. Louis, Missouri, in which the bank was directed to produce for examination by respondent's agents all books, papers, and other records, which the bank possessed with respect to petitioners' return for 1983. On October 29, 1986, petitioners filed with the United States District Court for the Eastern District of Missouri a petition to quash the summons served by

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[1]Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954 as amended and in effect for the years in issue.

respondent on Landmark Bank. On May 1, 1987, the District Court dismissed the petition to quash; and on May 18, 1987, Landmark Bank advised respondent that the records summoned were available to respondent. Respondent obtained the records from Landmark Bank on or before May 22, 1987.

On December 7, 1987, or 3 years and 236 days after petitioners filed their 1983 return, respondent mailed to petitioners a deficiency notice in which he determined deficiencies in and additions to their income taxes for 1983, 1984, and 1985. Petitioners filed a timely petition with this Court seeking a redetermination of the deficiency and additions to tax with respect to only 1983. Before the case was called for trial, petitioners filed a motion for summary judgment contending that respondent's notice of deficiency was not

mailed within 3 years after their 1983 return was filed as required by section 6501(a). In connection with their motion, petitioners did not refer to section 301.7609-5(b), Proced. & Admin. Regs., and made no attempt to demonstrate that the regulation was invalid or did not constitute a reasonable interpretation of section 7609(e), as had been determined in a Memorandum Opinion by this Court. See Henson v. Commissioner, T.C. Memo. 1986-303, affd. on this issue 835 F.2d 850 (11th Cir. 1988). See also Sly v. Commissioner, T.C. Memo. 1988-443; Schmitz v. Commissioner, T.C. Memo. 1984-373; Edwards v. Commissioner, T.C. Memo. 1981-669. We denied petitioners' motion for summary judgment.

At trial respondent filed a motion for sanctions against petitioners including the dismissal of their case for failing to

cooperate with the Court and respondent in the preparation of their case for trial. After a hearing we granted respondent's motion and dismissed petitioners' case and entered a decision against them for the full amount of the deficiency in, and additions to tax, determined by respondent with respect to 1983.

On appeal the Court of Appeals agreed with our dismissal of petitioners' case but remanded the matter with instructions to review our decision with respect to petitioner's motion for summary judgment and in doing so to consider the scope of section 301.7609-5(b), Proced. & Admin. Regs., vis-a-vis the statutory authorization provided by section 7609)e). Hefti v. Commissioner, 899 F.2d 709 (8th Cir. 1990). The Court of Appeals further instructed that, if after such consideration we deem the regulation valid

and controlling in this case, we should enter a judgment of dismissal consistent without previous determination. On the other hand, if we determine that the regulation is inconsistent with section 7609(e), we are directed by the Court of Appeals to enter an order granting petitioners' motion for summary judgment.

Insofar as pertinent here section 7609 provides:

> SEC. 7609. SPECIAL PROCEDURES FOR THIRD-PARTY SUMMONSES.
>
> (1) IN GENERAL.-If--
>
> (A) any summons described in subsection (c) is served on any person who is a third-party record keeper, and
>
> (B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the

23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

* * *

(b) RIGHT TO INTERVENE; RIGHT TO PROCEEDING TO QUASH.--

(1) INTERVENTION.--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) PROCEEDING TO QUASH.--

(a) IN GENERAL.--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

* * *

(e) SUSPENSION OF STATUTE OF

LIMITATIONS.--

(1) SUBSECTION (b) ACTION.--If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

* * *

(h) JURISDICTION OF DISTRICT COURT; ETC.--

(1) JURISDICTION.--The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceedings brought under subsection (b)(2), * * *. An order denying the petition shall be deemed a final order which may be appealed.

Section 301.7609-5, Proced. & Admin. Regs., provided as follows:

SUSPENSION OF STATUTES OF

LIMITATIONS.--(a) Agent, nominee, etc. Under section 7609(e), statutes of limitations are suspended if a notified person with respect to whose liability a summons is issued, or the notified person's agent, nominee, or other person acting under the direction or control of the notified person, takes any action as provided in section 7609(b). A person is a notified person's agent, nominee, or other person acting under the direction or control of a notified person for purposes of section 7609(e) if the person with respect to whose liability the summons is issued has the ability in fact or at law to cause the agent, etc., to take the actions permitted under section 7609(b). Thus, in the case of a corporation, direction or control by the notified person may exist even though less than 50 percent of the voting power of the corporation is held by the notified person.

(b) Period during which a proceeding, etc., is pending. Under section 7609(e), the statute of limitations may be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending. This period begins on the date the petition to quash the summons is filed in district court. The period continues until all appeals are disposed of, or until the expiration of the period in which an appeal may be taken or a request for a rehearing may be made. Full compliance, partial

compliance, and noncompliance have no effect on the suspension provisions. [Emphasis added.] Of course, if the notified person takes no action provided in subsection (b) of section 7609, no suspension of the statutes of limitations takes place. The periods of limitations which are suspended under section 7609(e) are those which apply to the taxable periods to which the summons relates.

(c) Taking of action as provided in section 7609(b). Section 7609(b) allows intervention by a notified person as a matter of right upon compliance with the Federal Rules of Civil Procedure. The phrase "takes any action as provided in subsection (b)", found in section 7609(e), includes any intervention, whether or not section 7609(b) is specifically mentioned in the order of the court allowing intervention. The phrase also includes the fulfilling of only part of the requirement of section 7609(b)(2), relating to the right of a person to institute a proceeding to quash. Thus, for instance, if a notified person notifies a person who has been summoned by sending a copy of the petition by registered or certified mail but does not mail a copy of that notice to the appropriate person and office under section 7609(b)(2)(B), the notified person has taken an action under section 7609(e).

(d) Effective dates. This section applies to summonses served after December 31, 1982. For the

> rules applicable to summonses issued on or after March 1, 1977, and before January 1, 1983, see 26 CFR 301.7609-5 (revised as of April 1, 1984).

The only issue before us is the validity of that portion of section 301.7609-5(b), Proced. & Admin. Regs., which pertains to the effect, if any, of the compliance by the bank with respondent's summons on the 3-year period of limitations provided by section 6501(a).

If, as contended by petitioners, the tolling of the 3-year period of limitations as required under section 7609(e) was terminated by the bank's compliance, respondent's notice of deficiency was not timely. This is true because the tolling of the 3-year statute would have started on October 29, 1986, the date the petition to quash the summons was filed by petitioners with the district court, and would have ended at the latest on May 22, 1987. In

such case the total period for the tolling would have been at most 205 days. Since the deficiency notice was mailed by respondent 236 days after the expiration of the 3-year statute of limitations it is apparent that if petitioners' contention is correct the tolling was not sufficient to cause the notice to be timely.

On the other hand, if as contended by respondent, the tolling was not terminated by the bank's compliance but instead continued until June 30, 1987, the last day for an appeal by petitioners of the dismissal by the district court of their petition to quash the summons, respondent's deficiency notice was timely. This is true because in such case the tolling of the 3-year statute would have been for 244 days (October 29, 1986 to June 30, 1987) and since the notice was mailed by respondent only 236 days after the expiration of the

3-year period the notice would have been timely.

In support of their contention that the tolling of the 3-year statute provided by section 6501(a) ended with the bank's compliance with respondent's summons, petitioners rely upon two recent opinions by the Eighth Circuit, i.e., United States v. Meyer, 808 F.2d 1304 (8th Cir. 1987), United States v. Orlowski, 808 F.2d 1283, 1287 (8th Cir. 1986). Petitioners place particular emphasis upon the statement in Orlowski "that a proceeding to enforce an IRS summons would be deemed 'pending' until there exists full compliance with the IRS summons or until the sixty-day appeal period following the entry of the judicial enforcement order has lapsed, whichever is shorter." United States v. Orlowski, supra, at 1287.

In further support of their argument

that section 301.7609-5(b), Proced. & Admin. Regs., attempts to unduly enlarge the tolling period provided by section 7609(e), petitioners also rely upon United States v. Sherlock, 756 F.2d 1397 (7th Cir. 1983); EEOC v. St. Regis Paper Co., 717 F.2d 1302 (9th Cir. 1983) (EEOC subpoena case); United States v. Equity Farmers Elevator, 652 F.2d 752 (8th Cir. 1981); United States v. Trails End Motel, Inc., 657 F.2d 1169 (10th Cir. 1981); United States v. Patmon, 630 F.2d 458 (6th Cir. 1980); United States v. Arthur Andersen & Co., 623 F.2d 720 (1st Cir. 1980); United States v. Deak-Peres Intl. Banking Corp., 610 F.2d 89 (2d Cir. 1979); Kurshan v. Riley, 484 F.2d 952 (4th Cir. 1973); and Vesco v. SEC, 463 F.2d 1350 (3d Cir. 1972) (SEC subpoena case).

After reviewing the foregoing opinions we conclude that they are inapposite for

the reasons hereinafter set out. First in United States v. Orlowski, supra, the situation involved, as stated by the Court of Appeals, was as follows:

> In 1980, pursuant to a civil audit of Orlowski's civil tax liability for 1977 and 1978, the IRS issued administrative summonses to five banks requesting that they produce the records of all accounts maintained by Orlowski and his wife during these two years. The IRS also issued a summons to Victor Orlowski in his capacity as the president of Victor Foods, Inc., to produce records of the Victor Foods business. Pursuant to a provision of the Internal Revenue Code, Orlowski was notified of the service of the summonses, I.R.C. section 7609(a)(1) (1982), and, as was his right, Orlowski directed the banks not to comply with the summonses. I.R.C. section 7609(b)(2).[2] On September 4,

---

[2]At the time, section 7609(b) read in part as follows: (2) Right to stay compliance.--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2)--

> 1981, the Government filed petitions to enforce each of the summonses in the Eastern District of Missouri. I.R.C. Section 7609(d)(2). On October 13, 1981, Orlowski entered a consent to the enforcement of the IRS summons of the Victor Foods' records. On October 14, 1981, the district court directed that the summonses against each of the five banks be enforced by separate orders, and Victor and Sharon Orlowski interposed "no objection" on the record of each case. Neither the five banks nor Orlowski appealed the district court's orders regarding the bank summonses during the sixty-day period provided under Fed.R.App.P. 4(a)(1). [Emphasis added. United States v. Orlowski, supra, at 1286-1287.]

Without any reference to section 301:7609-5(b), Proced. & Admin. Regs., the Court of Appeals in Orlowski concluded as follows:

> We hold that a proceeding to enforce an IRS summons should be deemed "pending" until there exists full compliance with the IRS summons or until the sixty-day appeal period following the entry of the judicial

---

(A) notice in writing is given to the person summoned not to comply with the summons,* * *. Sec. 7609(b)(2)(A).

enforcement order has lapsed, whichever is shorter. [Emphasis added.] This rule follows directly from the statute. A taxpayer who intervenes in a third party summons under section 7609(b)(1) may appeal a judicial enforcement order. [Fn. refs. omitted.] Such an appeal is valid when filed at any time during the sixty-day appeal period so long as the parties subject to the summonses have not yet complied with the summonses. This circuit, as well as every other circuit that has considered the question, has determined that compliance with an IRS summons moots a taxpayer's appeal of summons enforcement orders. Thus, because the taxpayer has the capacity to appeal an outstanding summons enforcement order at any time during the sixty-day appeal period, a proceeding to enforce an IRS summons is necessarily "pending" during this sixty-day appeals period.

Applying this rule to the present case, the prosecution under count I of Orlowski's indictment is not time-barred. The record reveals that full compliance with the five summonses was not achieved until after the lapse of the sixty-day appeal period. Although three of the five banks subject to the summonses fully complied with the September 4, 1981 enforcement order within the sixty-day appeal period, two banks, the Bank of Old Monroe and the First Bank of St. Louis, did not completely comply with the summonses until April 11, 1983 and April 8,

> 1983, respectively. Orlowski could have appealed the district court's enforcement orders at any time during the sixty-day appeal period. * * * [United States v. Orlowski, supra at 1287.]

From the foregoing it is apparent that in Orlowski compliance with the IRS summons did not occur during the appeal period, as in the case before us, but after the appeal period had expired. Therefore, to the extent that the conclusion in Orlowski indicates that the tolling of the limitations period ends on compliance with a summons prior to the end of the appeal period, it is dictum and does not control our decision in this case. See Golden v. Commissioner, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971).

In United States v. Meyer, supra, which involved a situation analogous to that in Orlowski, i.e., the effect of section 7609(e) upon the statute of

limitations for criminal violations as set forth in section 6531, the Eighth Circuit, citing its earlier opinion in Orlowski and a Memorandum Opinion of this Court, Edwards v. Commissioner, T.C. Memo. 1981-669, concluded that the limitation period in section 6531 was tolled during the 60-day period for an appeal from a summons enforcement proceeding even though an appeal was not taken. United States v. Meyer, supra at 1306. The holding in Meyer, standing alone, would appear to be that the statute of limitations is tolled until the time for appeal has run, without regard to any compliance which precedes the last date for appeal. However, the appellate court in this case (Hefti v. Commissioner) read the opinions in Meyer and Orlowski as consistent, and as together fashioning the rule that the statute of limitations continues to be tolled during

the 60-day appeals period, whether one is taken or not, unless full compliance occurs before the 60 days for appeal has elapsed Hefti v. Commissioner, supra at 713 n. 8.

In both Orlowski and Meyer, compliance with the summons did not occur before the expiration of the appeal period. Therefore, in Orlowski and Meyer the shorter of the two periods set forth in Orlowski, i.e., until expiration of the appeal period or until compliance with the summons, was the expiration of the appeal period. We conclude, therefore, that the case before us is factually distinguishable from both Orlowski and Meyer. Moreover, since Orlowski and Meyer and none of the other cases cited by petitioners involved a consideration of the effect of section 301.7609-5)(b), Proced. & Admin. Regs., on the tolling of the applicable statute of limitations, it is necessary, as requested

by the appellate court in its remand, that we consider the language of the regulation vis-a-vis the statutory provision.

At the outset it is noted that Meyer does refer to 301.7609-5(b), Proced. & Admin. Regs., and seemingly approves the regulation's interpretation that the tolling of the limitations period continues to pend during the 60-day period for the filing of an appeal where no appeal is filed. United States v. Meyer, supra at 1306. However, the standard laid down by the dictum in Orlowski that compliance by the third party with a summons prior to the expiration of the appeal period terminates the tolling of the period of limitations is clearly irreconcilable with the regulation which states that compliance with a summons during the appeal period has no effect on the tolling period provided by section 7609(e).

In determining the propriety of the challenged portion of the regulation, we begin with the observation that the Secretary has authority under section 7805 to promulgate all needful regulations. Insofar as applicable here, regulations may be either "legislative" or "interpretative" in character. Estate of Pullin v. Commissioner, 84 T.C. 789, 795 (1985). An "interpretative" regulation is issued under the general authority vested in the Secretary by section 7805, while a "legislative" regulation is issued pursuant to a specific congressional delegation to the Secretary. While the Court of Appeals in its remand directed us to "consider the scope of [the regulation] vis-a-vis statutory authorization from I.R.C. section 7609(e)," (Hefti v. Commissioner, supra at 714) section 7609(e) does not specifically delegate to the Secretary the authority to

prescribe regulations thereunder. The challenged regulation, therefore, is not legislative in character, but interpretive, and accordingly is subject to the more stringent standard of review applicable to the latter. Estate of Boeshore v. Commissioner, 78 T.C. 523, 527 n. 5 (1982).

Nevertheless judicial deference is given to an interpretive regulation because "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code." United States v.Correll, 389 U.S. 299, 307 (1967). Such a delegation ensures that "the rules will be written by 'masters of the subject,' [citation omitted] who will be responsible for putting the rules into effect." National Muffler Dealers Association, Inc., v. United States, 440 U.S. 472, 477 (1979).

While an interpretive regulation is entitled to judicial deference, it is not entitled to as much deference as that owed to a regulation which is promulgated under a specific grant of authority and is thus legislative in character. United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982). Moreover, the standard of deference accorded an interpretative regulation only sets "the framework for judicial analysis; it does not displace it." United States v. Cartwright, 411 U.S. 546, 550 (1973).

An interpretive regulation may not contradict the unambiguous language of a statute. Citizen's National Bank of Waco v. United States, 417 F.2d 675 (5th Cir. 1969). Even if a regulation does not clearly contradict or limit the language of the statute it purports to interpret, the regulation may still be invalid if it is

fundamentally at odds with or inconsistent with the statute's origin and purpose. United States v. Vogel Fertilizer Co., supra at 26; CWT Farms, Inc. v. Commissioner, 79 T.C. 1054, 1062 (1982), affd. 755 F.2d 790 (11th Cir. 1985). Nevertheless in final analysis an interpretive regulation must be sustained unless it is unreasonable and plainly inconsistent with the statute it purports to interpret. Bingler v. Johnson, 394 U.S. 741, 750 (1969).

The first step in our analysis of section 301.7609-5(b), Proced. & Admin. Regs., is to determine whether the applicable statute, section 7609(e), is so general or ambiguous as to require an interpretative regulation. National Muffler Dealers Association, Inc. v. United States, supra at 476. We, like the Eighth Circuit, find section 7609(e) ambiguous on

its face since it does not define the term "proceeding" as used in the phrase "for the period during which a proceeding, and appeals therein * * * [are] pending." Nor does it attempt to define the word "pending" with respect to the period during which the applicable limitations statute is tolled. It is apparent, therefore, that a regulation designed to clear up these ambiguities is warranted.

The next step in our analysis of the regulation is to determine if it implements "the congressional mandate in some reasonable manner." United States v. Correll, supra at 307. In making such determination we are directed by the Supreme Court in National Muffler Dealers Association, Inc., supra at 477, to consider:

> whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation

> may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent reenactments of the statute. [Citations omitted.]

In considering these factors, we are mindful that the "choice among reasonable statutory interpretations is for the commissioner, not the courts." National Muffler Dealers Association, Inc. v. United states, supra at 488. The issue is whether the Secretary's interpretation of the statute is a reasonable one, rather than the best or only one, and when the regulation implements in some reasonable manner the congressional intent underlying a provision courts are not at liberty to

strike down the regulation merely because the taxpayer offers a more attractive statutory interpretation. Brown v. United States, 890 F.2d 1329, 1338 (5th Cir. 1989). Thus we are constrained to uphold the regulation if it has a reasonable basis in the statutory history, even though petitioners' challenge may have some logical force. Pagel, Inc. v. Commissioner, 91 T.C. 200, 218 (1988), affd. 905 F.2d 1180 (8th Cir. 1990). By reference to the factors set forth in National Muffler Dealers Association, Inc., v. United States, supra, we are satisfied that section 301.7609-5(b) of the regulations is entitled to the greatest degree of deference that is applicable to an interpretive regulation.

First, because it is a substantially contemporaneous construction of the statute by the Secretary who is presumed to have

been aware of the congressional intent. National Muffler Dealers Association, Inc. v. United States, supra at 477; see also United States Trust Co. v. I.R.S., 803 F.2d 1363 (5th Cir. 1986); and Greenacre Foundation v. United State, 762 F.2d 965 (Fed. Cir. 1985).

Secondly, the relevant portion of the regulation is consistent with the usual understanding of the pendency of a Federal court proceeding. See Porter v. Investors Syndicate, 286 U.S. 461, 470 (1932), holding that a recognized meaning of "pending" is "while the time is running for bringing * * * an action;" American Equitable Assur. Co. v. Helvering, 68 F.2d 46 (1933), holding that a proceeding placed on the docket of the Board of Tax Appeals was sufficient to suspend the period of limitations on assessment even though the case was ultimately dismissed for lack of

jurisdiction. Thus under section 7609(e)(1) a proceeding is "pending" merely by the fact that it is placed on a docket for consideration and suspends the applicable statute of limitations even though the proceeding may ultimately be dismissed for lack of jurisdiction because of mootness.

In this connection, we note that mootness is a jurisdictional question since article III, section 2 of the Constitution limits the jurisdiction of the Federal judicial system to "cases" and "controversies." If a dispute in litigation turns on the performance of a specific act, e.g., the compliance with an administrative summons, the litigation loses all substance and becomes moot when that act is performed. In other words, "the thing sought to be prohibited has been done and cannot be undone by any order of

court." See Jones v. Montague, 194 U.S. 147, 153 (1904). Hence without a case or controversy the court no longer has jurisdiction.

Thirdly, the regulation has been in existence without relevant change since its proposal in 1980, and during its existence Congress has amended section 7609 five times and section 7609(e) has been amended twice without amending section 7609(e)(1) to militate against the regulation's interpretation of the statute.

Section 301.7609-5(b), Proced. & Admin. Regs., was originally proposed on August 21, 1980, after the enactment of section 7609(e) by the Tax Reform Act of 1976, Pub.L. 94-455, 90 Stat. 1520, 1701, 1976-3 C.B. (Vol. 1) 1. The stated purpose for the regulation was to "provide necessary guidance to the public for compliance with the Act." T.D. 7899, 1983-

2 C.B. 266. The regulation was approved in final form on May 3, 1983, and filed on July 18, 1983. Section 7609 was amended by sections 331 and 332 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248, 96 Stat. 324, 620-621, 1982-2 C.B. 462, so as to place the burden of commencing a proceeding with respect to a third-party recordkeeper on the taxpayer. This amendment required a corresponding change in the regulation which was approved in final form on May 28, 1986, and filed on June 24, 1986. See T.D. 8091, 1986-2 C.B. 210. In all other respects, the relevant portion of the regulation has remained unchanged since its proposal in 1980.

In more than 10 years since its proposal the regulation has not only remained unchanged in relevant part but it has also been consistently interpreted by respondent as he does herein. See, e.g.,

Henson v. Commissioner, T.C. Memo. 1986-303, affd. in part and revd. in part on other grounds 835 F.2d 850 (11th Cir. 1988). See also Sly v. Commissioner. T.C. Memo. 1988-443; Schmitz v. Commissioner, T.C. Memo. 1984-373. During the same period Congress has twice amended section 7609(e) without any revision to section 7609(e)(1).

Finally we must determine whether the regulation comports with the statute's plain language, origin, and purpose because as stated before the regulation must be sustained unless it is unreasonable and plainly inconsistent with the underlying statute. Bingler v. Johnson, supra at 750. In making this determination we first look to the ordinary usage or settled meanings of the words used in the statute by Congress. Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925); Mountain Water

Co. of La Crescenta v. Commissioner, 35 T.C. 418, 424 (1960). To do so, it is appropriate to consult dictionaries. National Muffler Dealers Association, Inc. v. United States, supra at 480 n. 10; south Jersey Sand Co. v. Commissioner, 30 T.C. 360, 368 (1958), affd. 267 F.2d 591 (3d Cir. 1959). However, in this instance the accepted dictionary definition of "pending" is of little specific help. See Black's Law Dictionary, 1021 (5th ed. 1979), where the word is defined as "Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; * * * an action or suit is 'pending' from its inception until the rendition of final judgment." Furthermore when used by Congress in a statute a word may have more than one meaning. See Electrical Workers v. Robbins & Meyers, Inc., 429 U.S. 229 (1976), where the Court

considered the meaning of "pending" as used in the 1972 amendments to Title VII, Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103. In that case, a discharged employee filed a charge with the EEOC more than 90 days after an alleged wrongful discharge. When the charge was filed it was untimely because the relevant statute required that such charges be filed within 90 days after the employee's discharge. Shortly after the charge was filed, the Equal Opportunity Act of 1972, 86 Stat. 113, became effective. This act extended to 180 days the time within which to file such charges and section 24 of the new act provided: "The amendments made * * * shall be applicable with respect to charges pending with the Commission on the date of the enactment of this Act and all charges filed thereafter."

In Electrical Workers, the former

employer contended that the employee's charge was not "pending" at the time of the amendment made by the 1972 act because it was untimely when filed. In rejecting that interpretation of "pending" the Supreme Court stated:

> This reading of "pending"--confining it to charges still before the Commission and timely when filed,--is not the only possible meaning of the word, [and] is largely rebutted by the legislative history * * * "Pending" is simply not a term of art that unambiguously carries with it a meaning precisely suited for this situation; equally logical, for example, would be an interpretation that read "pending" to mean "filed and not yet rejected" * * * [Electrical Workers v. Robbins & Meyers, Inc., supra at 242, 243.]

In the case before us it is clear from a review of the legislative history of section 7609 that by its enactment Congress sought to strike a balance between the privacy interests of taxpayers and the need of the IRS to employ an administrative summons. Prior to the enactment of section

7609, IRS had authority to issue without notice to the taxpayer a summons to a third-party recordkeeper to examine any "books, papers, records or other data which may be relevant or material" to the investigation of the taxpayer. Sec. 7602. While the third party had the right to challenge the summons, the taxpayer could not intervene in a proceeding to enforce the summons. See Donaldson v. United States, 400 U.S. 517, 528-531 (1971). Nor was there any statutory requirement that the taxpayer be informed of a third-party summons. Congress noted that in most circumstances the third-party record-keeper's "interest in protecting the privacy of the records in question [was] frequently less intense than that of the person to whom the records pertain," and concluded that the involvement of the taxpayer, who had a direct interest in the

records sought, would help to curb some of the abuses that had previously existed in the third-party summons procedure. S. Rept. 94-938 (1976), 1976-3 C.B. (Vol. 3) 376, 380-381; H. Rept. 94-658, 1976-3 C.B. (Vol. 2) 695. Staff of Joint Comm. on Taxation, General Explanation of the Tax Reform Act of 1976, 1976-3 C.B. (Vol. 2) 1, 307-308. Out of concern that the lack of both standing and notice could prevent a taxpayer from effectively safeguarding his right of privacy,Congress enacted section 7609 as part of the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, to require the Commissioner to provide notice to a taxpayer within 3 days after the issuance of a summons to a third-party recordkeeper, and to provide the taxpayer with an opportunity to intervene in a proceeding to enforce the summons. Sec. 7609(a) and (b)(1). See H. Rept. 94-658 (1976).

Congress, however, was also concerned that the newly granted protections of section 7609 would not only provide taxpayers with the opportunity to challenge infringements of their constitutional rights but would also enable some taxpayers to abuse the opportunity by instituting or intervening in a proceeding only to delay respondent's examination while the period for assessment continued to run. S. Rept. 94-938 (1976), 1976-3 C.B. (Vol. 3) 376, 380-381. Congress accordingly enacted section 7609(e) which provides for a suspension of both the civil (section 6501) and criminal (section 6531) periods of limitation while a "proceeding, and appeals therein, with respect to the enforcement of such summons is pending." The conference report notes that the suspension period continues while the summons is being "protested by the taxpayer." H. Rept. 94-

1515 (Conf.) 485 (1976). Both the House and Senate reports refer to the suspension period as "the period of any court action by the [Internal Revenue] Service to enforce the summons." H. Rept. 94-658 (1976), 1976-3 C.B. (Vol. 2) 695; S. Rept. 94-938 (1976), 1976-3 C.B. (Vol. 3) 405, 409.

In the conference report to the 1986 amendment, adding to the Code section 7609(e)(2), which operates to toll the applicable period of limitation when a third-party recordkeeper contests a summons, the period for which the applicable statute of limitations is suspended under section 7609(e)(1) is described as the period from the date the "taxpayer intervenes in a dispute between the IRS and the third-party recordkeeper * * * until the entire dispute is resolve." H. Rept. 99-481 (Conf.) (1986), 1986-3 C.B.

(Vol. 4) 809.

As applicable herein section 7609(e) provides that if, as occurred in this case, a taxpayer files a petition to quash a summons served by respondent on a third party, the running of the period of limitation under section 6501 with respect to the taxpayer shall be suspended for the period during which the proceeding to enforce the summons, including appeals, is pending. In an attempt to clear up the ambiguity in section 7609(e) with respect to the duration of the suspension of the period of limitation, the Secretary adopted section 301.7609-5(b) of the regulations. Section 301.7609-5(b) provides that the suspension period commences on the date the petition to quash the summons is filed in the district court and continues until all appeals are disposed of or until the expiration of the period in which an appeal

may be taken. The regulation also provides that compliance by the third party with the summons has no effect on the suspension period.

The logic in the Secretary's conclusion that compliance by the third party with the summons has no effect on the suspension period becomes apparent when consideration is given to the difficulties and confusion which would be faced by the tax administrator if he was forced to make a factual determination as to whether there had been compliance with an administrative summons in order to compute the period during which the limitations period is suspended. See Kersting, supra, which had to be remanded for further findings with respect to compliance. In this respect, the regulation creates a bright line which both the taxpayer and respondent can apply with little if any difficulty.

From all of the foregoing, and taking into consideration the guidelines laid down in National Muffler Dealers Association, Inc., supra, we conclude that (1) section 7609(e) is so general and ambiguous as to require promulgation of an interpretive regulation by the Secretary; (2) section 301.7609-5(b) is a substantially contemporaneous construction of section 7609(e); (3) the regulation in relevant part has remained unchanged since its promulgation and has been consistently applied by respondent; (4) since its promulgation section 7609(e) has been amended twice by Congress without any change being made to 7609(e)(1); and (5) in its statement of the period during which the applicable periods of limitation are suspended under section 7609(e)(1) the regulation comports with the plain language of section 7609(e) its origin and purpose

as reflected by its legislative history. Therefore the regulation is reasonable and plainly consistent with its underlying statute.

We turn now to the opinions other than those of the Eighth Circuit in Orlowski and Meyer which are cited by petitioners in support of their contention. Supra page 8. We note first that two of these cases do not involve administrative summons issued in income tax cases, and consequently, have no bearing upon or relevance to section 7609(e) or section 301.7609-5(b) of the regulations. EEOC v. St. Regis Paper Co., 717 F.2d 1302 (9th Cir. 1983) (EEOC subpoena case); Vesco v. SEC, 462 F.2d 1350 (3d Cir. 1972) (SEC subpoena case). While some of the other cases relied upon by petitioners do involve administrative summons issued in income tax cases, they too have no relevance because such cases

predate the enactment of section 7609(e) or the adoption of section 301.7609-5(b) of the regulations. These cases include United States v. Porter, 711 F.2d 1397 (7th Cir. 1983); United States v. Equity Farmers Elevator, 652 F.2d 752 (8th Cir. 1981); United States v.Trails End Motel, Inc., 657 F.2d 1169 (10 Cir. 1981); United States v. Arthur Andersen & Co., 623 F.2d 720 (1st Cir. 1980 United States v. Patmon, 630 F.2d 458 (6th Cir. 1980); and United States v. Deak-Perera Intl. Banking Corp., 610 F.2d 89 (2d Cir. 1979).

The two remaining cases relied upon by petitioners, United States v. Kersting, 891 F.2d 1407, 1411 n. 9 (9th Cir. 1989) and United States v. Sherlock, 756 F.2d 1145 (5th Cir. 1985), are clearly inapposite as authority for petitioners' contention that their compliance with the summons in the case before us mooted an appeal from the

district court's dismissal of their petition to quash the summons served on their bank. In Sherlock the taxpayer's compliance with an administrative summons obviously did not prohibit the appeal which he prosecuted from the district court's order directing him to comply even though the court of appeals ultimately concluded that there was no longer a controversy because of his compliance with the order. The proceeding, however, was pending within the meaning of section 7609(e)(1) until the appeal was dismissed. Porter v. Investors Syndicate, supra; American Equitable Assur. Co. v. Helvering, 68 F.2d 46 (2d Cir. 1933). See also Bakery Sales Drivers Local Union v. Wagshal, 333 U.S. 437 (1948), holding that action taken merely in obedience to a court order (injunction) does not moot the appealability of the order.

In Kersting the taxpayer again obviously fully perfected an appeal from several orders by a district court including an order directing him to comply with a John Doe administrative summons. On appeal the Court of Appeals concluded that the record was not adequate to determine whether Kersting had fully complied with the summons and remanded the case to the district court with instructions to dispose of the other motions if Kersting's opposition to such motions was not rendered moot by full compliance with the summons. The opinion, therefore, is not authority for petitioners' contention that compliance with an administrative summons renders moot an appeal from an order directing compliance with the summons. In any event the proceeding involving the validity of the summons served on Kersting was pending at least until the appeal was dismissed.

In fact the appellate court, citing Donaldson v. United States, 400 U.S. 517, 531 (1971), points out that even if the question of the legality of the summons was found on remand to be moot, Kersting could still challenge its legality by moving to suppress in a subsequent trial any evidence obtained by respondent with the summons.

We find that the case before us is very analogous to American Equitable Assur. Co. v. Helvering, 68 F.2d 46 (2d Cir. 1933), affg. 27 b.T.A. 249 (1932). That case involved section 277 of the Internal Revenue Act of 1926, ch. 27, tit. II, 44 Stat. 9, 58, and section 504 of the Internal Revenue Act of 1928,ch. 852, tit. III, 45 Stat. 791, 870, which provided for the suspension of the period of limitations with respect to the assessment and collection of an income tax for a period during which a proceeding for the same

period was pending before the Board of Tax Appeals. The taxpayer contended that these sections did not operate to suspend the applicable period of limitations unless the Board ultimately determined that it had jurisdiction over the action. In rejecting the taxpayer's contention, the Second Circuit Stated:

> * * * [The taxpayer's] position is that, [since] the Board has held that it had no jurisdiction, * * * there was no proceeding placed on the docket in the sense that expression must be construed to have been used in * * * [sections 277 and 504]. If this be so, the government must treat as a nullity, in advance of a decision by the Board of Tax Appeals, every proceeding which is placed on the docket of the Board which has such infirmities that the Board finally dismisses it for lack of jurisdiction, unless it must accept the risk of the bar of the statute arising before it can know what the decision will be, and so is protected only by the chance that a decision will be rendered before the unsuspended period of limitation upon assessment had run. * * * The language used in both the clauses providing for the tolling of the statute seems to us to negative such a view. Congress might make the

> period of limitation whatever it saw fit, and of course it might make no such provision at all. Having established one, it was free to suspend its running upon the occurrence of such conditions as it thought best. It did, verbally at least, make one such condition the mere placing on the docket of the Board of a proceeding in respect to the deficiency. Even though the Board dismissed the proceeding, as it did in this case, for want of jurisdiction * * * the placing of the proceeding upon its docket gave it whatever right to act is involved in determining whether or not the petition was sufficient to give it jurisdiction to decide the matter on the merits. At any rate, a proceeding had been commenced which required the Board of Tax Appeals to make a decision though not necessarily on the merits. Because the effect of the passage of time would be the same whether the Board made its decision on the merits or on some other ground, if the period stated in the statute of limitation meantime expired, it is reasonable to believe that Congress did not intend to have the time a proceeding was pending before the Board counted any more when the decision was a dismissal for want of jurisdiction than when it was not. * * * [American Equitable Assur. Co. v. Helvering, supra at 47.]

Petitioners, like the taxpayer in American Equitable, contend that "pending"

as used in section 7609(e), is to be given a narrow construction, namely that a proceeding cannot pend beyond the point where jurisdiction is ultimately found to be lacking for mootness. Their narrow view of the problem is contradicted by the legislative history of the section. On the other hand section 301.7609-5(b), Proced. & Admin. Regs., is directly in line with such history.

We also find that this case is analogous to the situation frequently found in cases involving claims for litigation costs under section 7430. See, e.f., Weiss v. Commissioner, 88 t.C. 1036 (1986), affd. on this issue 850 F.2d 111 (2d Cir. 1988), where we concluded that we had jurisdiction to award litigation costs even though the case had been dismissed because we did not have jurisdiction over the subject matter.

For the reasons stated hereinbefore,

we conclude that section 301.7609-5(b), Proced. & Admin. Regs., is valid because it harmonizes with the plain language of section 7609(e) and its origin and purpose as disclosed by its legislative history. Consequently under the terms of section 7609(e) as interpreted by a regulation which we find to be valid, the bank's compliance in this case with the summons had no effect on the suspension of the limitation period provided by section 6501(a). Hence the proceeding to enforce the summons was pending until the expiration of the period for appeal and as a result respondent's deficiency notice was timely mailed.

In accordance with the directive of the Court above and consistent with our previous denial of petitioners' motion for summary judgment with respect to 1983,

An appropriate order

and decision will be entered.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1302

Charles and Marion Hefti,	*	
Appellants,	*	Appeal from the United States Tax Court
v.	*	
Commissioner of Internal Revenue,	*	
Appellee.	*	

Submitted: November 15, 1989

Filed: March 26, 1980

Before FAGG, Circuit Judge, FLOYD R. GIBSON, and BRIGHT, Senior Circuit Judges.

FLOYD R. GIBSON, Senior Circuit Judge

Charles and Marion Hefti appeal the tax court's[1] dismissal of their case for failure to comply with orders of that

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[1]The Honorable Perry Shields, United States Tax Court Judge.

court. We vacate the judgment and remand for determination of whether Treas. Reg. §301-7609-5(b) exceeds the congressional authorization in I.R.S. §7609(e).

I. BACKGROUND

A. The Dismissal

The Heftis received a statutory notice of deficiency from the Commissioner of Internal Revenue (the "Commissioner") on December 7, 1987, for deficiencies in the tax years 1983, 1984, and 1985. In March 1988, the Heftis filed petitions in the tax court seeking a redetermination of only the 1983 case. The Heftis argued that the determination and penalties were assessed in error and that the Commissioner had sent their statutory notice of deficiency beyond the three-year limitations period prescribed by statute.

The Heftis were familiar with proceedings in tax courts, having been

involved in litigation with the Commissioner on other occasions. Their pro se pleadings evidence at least some working knowledge of procedure and even some substantive law.[2] Nevertheless, they repeatedly failed to cooperate with the Commissioner in the preparation of a stipulation and, when they cooperated, did so only on the barest of facts such as their names and place of residence. They were well apprised of when and where their trial was to be held. Nevertheless, they were without justifiable excuse for their failure to appear when their case was

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[2]We do note, however, that the fact that they proceeded pro se probably caused the Heftis difficulties as well. See United States v. Hefti, 879 F.2d 311, 315 n. 13 (8th Cir. 1989), cert. denied, 110 S.Ct. 1125 (1990).

called in October 1988.[3] We find it unnecessary to detail any further facts in this regard, and suffice it to say that the record makes it clear that the tax court did not abuse its discretion by dismissing the Heftis' case for the 1983 year. See Long v. C.I.R., 742 F.2d 1141 (8th Cir. 1984) (per curiam); Hart v. C.I.R., 730 F.2d 1206, 1208 (8th Cir. 1984) (per curiam). We affirm the tax court on that point, subject to the remand discussed below.

The tax court, of course, was without

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[3]The Heftis go a long way to make an argument that we find to be without merit. Much of the Heftis' difficulties arose from a failure to comply with discovery in the tax court. They argue that they failed to do so to avoid mooting parallel litigation in United States District Court. Whatever their perceptions about mootness, the Heftis were obligated to comply with the discovery requirements and orders of the tax court.

authority to render a decision on the 1984 and 1985 years as they were not contested by the petition before it.[4] The facts surrounding the statute of limitations and the treasury regulation, however, require further explication.

B. The Statute of Limitations

The Heftis received their statutory notice of deficiency for the 1983 tax year on December 7,1987, some three years and 236 days after their timely tax filing on April 15, 1984. The deficiency was assessed beyond the statute of limitations by about 236 days, absent some tolling of

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[4]The tax court recognized this when it said that it was reaching a decision on those years "[t]o the extent, if any, that [it] should have by some stretch of the imagine [sic] jurisdiction over the years 1984 and 1985," Record Doc. 30, p. 31. It had none, and its decision on those years is reversed. I.R.C. §6214(b) (1982).

the statute.[5] Here the statute was tolled by a petition from the Heftis to quash a summons obtained by the Commissioner in United States District Court against a third-party bank.

The Heftis filed their motion to quash on October 29, 1986. The statute was tolled at that point. On May 1, 1987, the District Court dismissed the petition. From that dismissal the Heftis had a right of appeal. However, on May 18, 1987, before any further action by the Heftis, full compliance was made with the summons by the third-party bank. That full compliance would necessarily moot any appeal taken by the Heftis, though

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[5]I.R.C. §6501(a) (1982) gives the Commissioner three years from the taxpayer's return filing to assess and send notice of a deficiency, although by 6501(b)(2) a return filed before the last day prescribed by law is deemed filed on that last day.

technically they could actually file an appeal, as the time to appeal had not expired.

Thus, two dates are in contention as the day on which the statute began to again run: May 18, 1987, the date of full compliance by the third-party bank, and June 30, 1987, the date by which the Heftis would have had to have filed an appeal (within sixty days) from the District Court's May 1st order of dismissal. Taking May 18, 1987, as the date on which the statute began to again run, the tolled period was for some 201 days, and the notice of deficiency sent on December 7, 1987, would have been outside the statute of limitations by more than a month. On the other hand, taking June 30, 1987, the tolled period was for some 2144 days, and the deficiency notice would have been mailed inside the statutory period with

more than a week to spare. The Heftis argue the former tolled period, while the Commissioner argues the latter, relying on the treasury regulation in question. The Heftis filed a summary judgment motion on this point with the tax court on September 21, 1988, which was denied the following day without remarks and apparently without considering the regulation which is the subject of our remand.

This appeal comes from the tax court's dismissal of the Heftis' suit by its November 8, 1988, order and decision. We find the Heftis' claims on sanctions and recusal of the tax judge to be without merit. We discuss only the statute of limitations claims below.

II. DISCUSSION

A. Reviewability of the Summary Judgment Denial

The first matter in the statute of

limitations issue is whether we can pass on the question at all. Raised by the Heftis in a motion for summary judgment which was denied by the tax court, the issue was the subject of an interlocutory order and not directly appealable. Because the Heftis' claim was dismissed by the tax court for failure to comply with orders of that court, the question is whether the denial of summary judgment merges into the order of dismissal and final decision of the tax court so that we can review the statute of limitations issue. We believe that it does.

The Commissioner makes a sound procedural argument for the rule that interlocutory orders do not merge into dismissals for failure to prosecute, relying on Ash v. Cvetkov, 739 F.2d 493 (9th Cir. 1984), cert. denied, 470 U.S. 1007 (1985). This circuit has very

recently relied on Cvetkov, adopting the same rule of law in the case of DuBose v. Minnesota, 893 F.2d 169 (8th Cir. 1990).

DuBose involved several Title VII claims, some of which had been dismissed on a motion for summary judgment, others of which had not. When the remaining claims went unprosecuted, the district court dismissed them for that reason. On appeal of the dismissal order, DuBose sought review of the earlier partial summary judgment order entered against him. We held (over a dissent) that review of that order was unavailable because it had not merged with the Rule 41(b) dismissal for failure to prosecute, whether that failure was purposeful or not. We did so for the policy reason that a failure to prosecute should not reap the benefit of gaining review of an otherwise unreviewable interlocutory order. And, of course,

underlying that reason is the familiar concern for judicial economy by the avoidance of piecemeal litigation.

Those reasons, however, we do not believe make for good policy in this case. While we think the rule of law in DuBose is a good one for standard civil disputes, we do not think it should apply in the Heftis' tax case for the following reasons.

First, where DuBose had filed separate claims under Title VII arising over several years time, the Heftis have but one claim, that their 1983 tax deficiency was wrongly assessed. DuBose had partial summary judgment entered against him on some claims and not others based on the facts of his several claims, while the Heftis had summary judgment entered against them on what amounts to a question of law as to the applicability of the statute of limitations, under their one and only

claim.[6] Preventing the merger of separate and earlier decided claims into the dismissal of unprosecuted claims seems a wise rule, but preventing the merger of an integral issue of law into dismissal of the only claim does not. In DuBose the district court entered partial summary judgment on some claims, and the case proceeded for the determination of separate claims until dismissed for failure to prosecute those surviving claims. Regardless of how the partial summary judgment order was entered, some claims

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[6]We cannot say from the record on what basis the tax court denied the Heftis' summary judgment motion. Certainly the undisputed facts with respect to the dates involved make it appear that the statute was exceeded (or not) depending only on what interpretation one gives the statute and applicable regulation, not on any disputed facts. That is necessarily a question of law, and thus we conclude that the motion was denied as a matter of law.

were going to survive. Here summary judgment was denied to the Heftis on a legal question, allowing the case to proceed. Hence, if summary judgment had been entered in favor of the Heftis, no claim would have survived at all and the Commissioner could have appealed.

Second, the lawsuit the Heftis initiated by their petition for redetermination was not a standard civil case--it was a tax case. When a taxpayer petitions for redetermination of a deficiency, in essence, the plaintiff-taxpayer becomes the defendant. it is really the Commissioner who has begun the litigation, because the taxpayer has no alternative but to sue for a redetermination. Thus the dismissal suffered in civil litigation as in DuBose is not as harsh as that incurred by dismissal in tax court. While DuBose's

case was dismissed with prejudice, and a Rule 41(b) dismissal is considered an adjudication on the merits, he lost only the chance to make his case. The Heftis, in suffering a tax court dismissal, suffered dismissal, adjudication on the merits under Rule 123(d),[7] and an order assessing deficiency.

Third, it is this last sufferance (which makes the Heftis look more like defendants hit with a default judgment in favor of the Commissioner than simply like plaintiffs who have perhaps sat on their rights) combined with the substantial legal question of whether the treasury regulation exceeds congressional authority, that compels us to allow review of the summary judgment order in this case.

It is not without some trepidation

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[7]United States Tax Court Rules, Rule 123(d).

that we do so, lest we open the way for "a rule that would depend upon nice calculations as to a plaintiff's motives, or lack thereof, for permitting a . . . dismissal to be entered." DuBose, 893 F.2d at 171. We are cautious that we heed that wisdom and do not invite room for that rule, let alone make such a rule ourselves. We have carved no real exception from the principle DuBose announced; we have simply found that it cannot, for the reasons given, apply in this case. "The punishment should fit the crime," id. at 172 (Arnold, J., dissenting and while DuBose's punishment was deserved, similar punishment against the Heftis is not.

B. The Statute of Limitations and the Treasury Regulation.

As we outlined above, two views are in contention as to how long the statute of limitations was tolled in this case.

Taking the statute on its face alone leaves some room for argument both ways, but that is where we must begin. In pertinent part, the statuted reads:

> (e) Suspension of statute of limitations
>
> (1) subsection (b) action
>
> If any person takes any action as provided in subsection (b) and such person is the person with respect to those liability the summons is issued . . ., then the running of any period of limitations under section 6501 . . . or under section 6531 . . . with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

I.R.S. §7609(e) (Supp. V 1987).

In this case the (motion to quash) proceeding was dismissed by the district court on May 1, 1987. The proceeding was no longer pending, but an appeal from the dismissal was possible for sixty days thereafter. Under the statute, the tolling

period continues during the pendency of a possible appeal. If nothing had happened in the interim, it would appear that the statute would be tolled until those sixty days had run. However, something did happen. The third-party bank complied with the summons on May 18, 1987. If that compliance moots the possibility of an appeal, then, arguably, the statute again began to run on May 18, because no appeal would have been pending. Contrariwise, an appeal could technically still be filed from the order of dismissal, and the statute could be said to be tolled until the sixty days for filing an appeal were up. Thus, the statute alone does not resolve our dispute.

Fortunately we have case law interpreting the statute. In United States v. Orlowski, 808 F.2d 1283 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987), Judge

Bright, writing for the panel, said:

> We hold that a proceeding to enforce an IRS summons should be deemed "pending" until there exists full compliance with the IRS summons or until the sixty-day appeal period following the entry of the judicial enforcement order has lapsed, whichever is shorter.

Id. at 1287 (emphasis added).

In Orlowski full compliance was had after the appeals period had run away. In a subsequent case, United States v. Meyer, 808 F.2d 1304 (8th Cir. 1987), Judge Fagg, in his opinion for the court, cited Orlowski for the proposition that the statute of limitations is tolled during the pendency of an appeal whether an appeal is taken or not. Id.at 1306. Meyer did not involve any compliance.

The "shorter period" in Orlowski and in Meyer was the sixty-day appeal period. But in this case, the compliance period was shorter as it was had in full by May 18,

1987. Thus, straight application of the rule announced in Orlowski (and left intact by Meyer) would suggest that the tolled period ended once the third-party bank fully complied on May 18, 1987.

Having said all that, however, only brings us to the beginning of our inquiry, because now we must consider the relevant treasury regulation which reads:

> (b) Period during which a proceeding, etc., is pending. Under section 7609(e), the statute of limitations may be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending. This period begins on the date the petition to quash the summons is filed in district court. The period continues until all appeals are disposed of, or until the expiration of the period in which an appeal may be taken or a request for a rehearing may be made. Full compliance, partial compliance, and noncompliance have no effect on the suspension provision.
>
> . . . .

Treas. Reg. §301.7609-5(b) (as amended in 1986) (emphasis added).

This regulation is directly contrary to the holding in Orlowski that full compliance terminates the tolled period if it occurs before the sixty-day appeal period has run. Neither Orlowski nor Meyer discusses the regulation,[8] and it is

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[8]Meyer does cite the regulation to support its holding that the statute of limitations is tolled during the sixty-day appeal period, but without discussion. Meyer goes onto point to Orlowski as the controlling law of the circuit. We do not agree with the Commissioner that Meyer stands with the regulation for the proposition that compliance of any kind has no effect on the tolled period. To the contrary, Meyer did not involve a compliance period and did not attempt to distinguish Orlowski along that line. We must take the opinions together, and in so doing, we read them as consistent. Meyer simply does not reach the question answered in Orlowski--whether full compliance cuts off the tolled period. Meyer stands for the proposition that "pendency" is during the sixty-day appeals period, while Orlowski stands for the same proposition, with the proviso that if full compliance comes sooner, the tolled period ("pendency") ends.

unclear how it might have been incorporated into either opinion had it been considered.

What is clear, in light of our holding in Orlowski with respect to I.R.C.§7609(e), is that the treasury regulation may exceed the scope of that section, and thereby be invalid. The tax court, as we earlier noted, gave no reason for its denial of the Heftis' summary judgment motion on the statute of limitations. Ordinarily we would review the denial of the motion as though we were hearing it ourselves, but because the regulation does not appear to have been considered in the disposition of that motion, we do not reach the question. We believe it is a question best considered first by the tax court.

Our research has revealed but one case that has addressed the precise question we ask. In Henson v. C.I.R., T.C. Memo 1986-303 (subsequent history omitted), the tax

court found that the regulation was not inconsistent with the statute. The Eleventh Circuit apparently upheld that holding, while reversing and remanding in part on other grounds. Henson v. C.I.R., 835 F.2d 850 (11th Cir. 1988). The court, however, did not discuss the question at all, and it would be a stretch to suggest that the circuit opinion stands for the proposition made in the memorandum. In any event, we do not consider the memorandum opinion from the tax court to be dispositive of the question as it arises in this circuit, in light of Orlowski, under the circumstances of this case.

III. CONCLUSION

We vacate the judgment and remand with instructions for the tax court to consider the scope of the treasury regulation vis-a-vis statutory authorization from I.R.S. §7609(e) consistent with this opinion. If

the tax court deems the treasury regulation valid and controlling in this case, it may enter a judgment of dismissal consistent with that ruling and the previous determination of that tax court. Alternatively, if the tax court determines that the regulation is inconsistent with the statute, see Orlowski, 808 F.2d as 1287, it must enter an order granting the taxpayers' summary judgment on the grounds that the deficiency notice for 1983 was sent by the Commissioner out of time.

FAGG, Circuit Judge, dissenting.

I respectfully dissent.

This panel of the court is not at liberty to ignore the ruling in DuBose v. Minnesota, 893 F.2d 169 (8th Cir. 1990), merely because the panel "do[es] not believe [DuBose] make[s] for good policy in this case." Ante at 5. Only the court sitting en banc has that prerogative.

Yates v. United States, 753 F.2d 70, 71 (8th Cir.) (per curiam), cert. denied, 471 U.S. 1002 (1985). Thus, the panel is obliged to follow the DuBose panel's holding "that a dismissal for failure to prosecute bars review of earlier entered interlocutory rulings." DuBose, 893 F.2d at 171. Because the Heftis' case was correctly dismissed for failure to prosecute, ante at 2, the tax court's interlocutory order rejecting the Heftis' statute of limitations argument is not reviewable.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.